

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

ESTHER M. CARABALLO-CECILIO,

Plaintiff,

V.

MARINA PDR TALLYMAN, LLC,

Defendant.

Civil No. 3:14-CV-01454 (JAF)

ORDER

7 This matter is before the court on Defendant Marina PDR Tallyman, LLC's oral
8 motion for reconsideration of this court's denial of its motion for summary judgment. At
9 the status conference held on January 21, 2016, Marina PDR Tallyman, LLC, requested
10 that the court reconsider its ruling for the limited purpose of determining the issue of
11 Marina PDR Tallyman, LLC's successor liability with respect to Marina Puerto del Rey.
12 Upon hearing argument from both parties as to why we should determine this issue, the
13 court granted Marina PDR Tallyman, LLC's request to reconsider – but only to determine
14 whether Marina PDR Tallyman, LLC is a successor employer of Marina Puerto del Rey.

Facts

16 On April 15, 2014, Plaintiff Esther Caraballo (“Plaintiff” or “Caraballo”) brought
17 suit against Defendant Marina PDR Tallyman, LLC (“Defendant” or “Marina”) in the
18 Court of First Instance in Fajardo, alleging that Marina committed employment
19 discrimination and wrongful discharge in violation of Puerto Rico Law No. 80, of
20 May 30, 1976, 29 L.P.R.A. § 185a, *et seq.* (“Law 80”); and Law No. 100, of June 30,
21 1959, 29 L.P.R.A. § 146, *et seq.* (“Law 100”), when it terminated her employment.

1 Marina removed the matter to this court on the basis of diversity jurisdiction
2 pursuant to 28 U.S.C. § 1332(a). Marina alleges that it is not a citizen of Puerto Rico, but
3 rather a Delaware limited liability company authorized to do business in Puerto Rico.
4 Marina asserts that this court has complete diversity for purposes of removal jurisdiction
5 under 28 U.S.C. § 1441(b) because its sole member is Putnam Bridge Funding III LLC
6 (“Putnam”), a Delaware limited liability company with principal place of business in
7 Greenwich, Connecticut.¹

8 Caraballo began working for Marina Puerto del Rey on October 31, 2003. On
9 December 28, 2012, Marina Puerto del Rey filed for bankruptcy under Chapter 11. *In re*
10 *Puerto Del Rey, Inc. a/k/a/ Marina Puerto Del Rey*, Bankruptcy Petition No. 12-10295-
11 ESL11, (D.P.R. Dec. 28, 2012) (ECF No. 1). On May 30, 2013, the bankruptcy court
12 entered an Order Confirming Plan, authorizing the sale of Marina Puerto del Rey to
13 Defendant Marina and additional non-parties to this litigation. *In re Puerto Del Rey, Inc.*
14 *a/k/a/ Marina Puerto Del Rey*, Bankruptcy Petition No. 12-10295-ESL11, ECF No. 172;
15 (ECF No. 56-1). Marina purchased the assets of Marina Puerto del Rey free of any liens
16 or encumbrances under the authority of Bankruptcy Code section 363. (ECF No. 56-1 at
17 14). Specifically, the transfer of the assets was “effectuated free and clear of any liens,
18 Claims, encumbrances, rights, remedies, restrictions, interests, liabilities, and contractual

¹ Recently, in another matter in which Marina was named as a defendant, we found the removal frivolous because “defendants lacked an objectively reasonable basis for seeking removal under either our diversity jurisdiction or our federal-question jurisdiction.” *Cortés-Pacheco v. PBF-TEP Acquisitions Inc.*, No. 3:15-cv-01460 (D.P.R. Dec. 23, 2015), ECF No. 46 at 13. In *Cortés-Pacheco*, the plaintiff named no fewer than seven defendants which, as a group, defeated diversity jurisdiction. *See id.* Here, Marina is the only defendant, and Caraballo does not dispute that the matter was properly removed. We see nothing in the pleadings that precludes diversity jurisdiction in this matter.

1 commitments of any kind or nature whatsoever, whether arising before or after the
2 Petition Date, whether at law or in equity, including all rights or claims based on any
3 successor or transferee liability, other than as set forth in the Term Sheet...." (ECF
4 No. 56-1 at 14).

5 On May 31, 2013, Caraballo executed an employment and confidentiality
6 agreement which stated that her employment with Marina began on May 31, 2013, and
7 that she was subject to a ninety-day probationary period. (ECF No. 46-2). Marina
8 terminated Caraballo's employment contract before the expiration of the ninety-day
9 probationary period.

10 Caraballo alleges that during her employment with Marina she was discriminated
11 against because of her age and that her termination was unlawful. Caraballo argues that
12 her claims against Marina do not include a successor liability claim. Instead, Caraballo
13 argues that her claims against Marina are direct liability claims, but that we must consider
14 the timeframe when she worked for Marina Puerto del Rey to calculate her damages
15 according to 29 L.P.R.A. § 185f. Conversely, Marina also argues that it terminated
16 Caraballo for "just cause" and that her damages, if any, are limited to the time period
17 during which she worked for Marina – that is, from May 31, 2013, to August 19, 2013.

18 **Law and Analysis**

19 The question currently before the court is whether, in the event that Caraballo
20 successfully proves her claims against Marina, her damages are limited to the time period
21 during which she worked for Marina.

1 We note that Caraballo is not attempting to hold Marina liable for the previous
2 wrongdoing of Marina Puerto del Rey. Instead, Caraballo argues that her damages for
3 Marina's violations of Law 80 must be calculated considering the time she worked for
4 Marina Puerto del Rey.

5 Under certain circumstances, Article 6 of Law 80 imposes liability on the
6 purchaser of the assets of an ongoing business for termination of the seller's employees.

7 See 29 LPRA § 185f, and *Arends v. Eurobank*, 845 F.Supp. 60 (D.P.R. 1994). 29
8 L.P.R.A. § 185f states:

9 In the case of transfer of a going business, if the new acquirer continues to
10 use the services of the employees who were working with the former
11 owner, such employees shall be credited with the time they have worked in
12 the basis under former owners. In the event that the new acquirer chooses
13 not to continue with the services of all or any of the employees and hence
14 does not become their employer, the former employer shall be liable for the
15 compensation provided herein, and the purchaser shall retain the
16 corresponding amount from the selling price stipulated with respect to the
17 business. In case he discharges them without good cause after the transfer,
18 the new owner shall be liable for any benefit which may accrue under
19 §§ 185a-185m of this title to the employee laid off, there being established
20 also a lien on the business sold, to answer for the amount of the claim.
21

22 The hiccup here is that Marina's purchase of Marina Puerto del Rey, through bankruptcy
23 proceedings, specifically stated that the employees of Marina Puerto del Rey were
24 terminated and subject to being rehired by Marina.

25 Relying on *Rodríguez-Oquendo v. Petrie Retail Inc. D.I.P. y/o Centro Retail*
26 *Corporation H/N/C/ Marianne, Urban Brands, Inc.*, 167 D.P.R. 509 (2006), Caraballo
27 argues that the purchase of Marina Puerto del Rey through bankruptcy proceedings "free
28 and clear" of all liens does not preclude her suit. There, the Puerto Rico Supreme Court

1 held that “the sale of assets under a federal bankruptcy proceeding, though free of liens,
2 will not bar the application of the successor employer doctrine as developed by our
3 caselaw precedents.” *Rodríguez-Oquendo*, 167 D.P.R. 509 (ECF No. 56-2 at 8). Under
4 the successor employer doctrine, “an employer who replaces another through a transfer of
5 assets or a corporate merger will assume the obligations contracted by the previous
6 employer.” *Id.* (ECF No. 56-2 at 3) (citations omitted).

7 Marina is correct that the facts of *Rodríguez-Oquendo* are distinguishable from the
8 case at bar. In *Rodríguez-Oquendo*, the plaintiff employee sued the successor employer
9 for harm that occurred prior to the transfer of assets. Additionally, there was no mention
10 of how the employees went from working for the predecessor to the purchaser, and the
11 sale order did not expressly provide language that the purchaser was not a successor
12 employer. Here, the harm allegedly occurred after the transfer of assets and has no
13 connection to the former employer. Caraballo’s claim is premised upon an obligation
14 remaining attached to the prior asset.

15 The Order Confirming Plan clearly considered and addressed the employees as
16 assets of Marina Puerto del Rey. (ECF No. 56-1). Marina paid the determined value for
17 Marina Puerto del Rey deeming all employees of Marina Puerto del Rey as terminated as
18 of the date of the sale. Paragraph 16 of the Order Confirming Plan states:

19 None of the Purchaser, its affiliates, or any of their respective members,
20 partners, shareholders, principals, employees, agents, representatives, and
21 advisors (as applicable) is a mere continuation of the Debtor or its estate, or
22 is holding itself out to the public as a continuation of the Debtor. There is
23 no continuity or common identity between the Debtor and any of Purchaser,
24 its affiliates, or any of their respective members, partners, shareholders,
25 principals, employees, agents, representatives, and advisors (as applicable),

1 and there is no continuity of enterprise between the Debtor and any of
2 Purchaser, its affiliates, or any of their respective members, partners,
3 shareholders, principals, employees, agents, representatives, and advisors
4 (as applicable). None of the Purchaser, its affiliates, or any of their
5 respective members, partners, shareholders, principals, employees, agents,
6 representatives, and advisors (as applicable) is a successor to the Debtor or
7 its estate, and none of the transactions contemplated by the Term Sheet or
8 any of the other Definitive Documentation, including, without limitation,
9 the Affiliate Transfer, the Sale, and the assumption and assignment of the
10 Assumed Contracts, amount to a consolidation, merger, or de facto merger
11 of the Purchaser, its affiliates, or any of their respective members, partners,
12 shareholders, principals, employees, agents, representatives, and advisors
13 (as applicable) with or into the Debtor. For the avoidance of doubt, any and
14 all employees of the Debtor or any affiliates of the Debtor (including,
15 without limitation, any and all employees who supply direct or indirect
16 services to the Debtor by way of their employment with any affiliate of the
17 Debtor), and any and all related obligations, wages, payments, and benefits
18 associated with any and all such employees, shall not be and hereby are not
19 assumed in any respect whatsoever by the Purchaser, nor do any such
20 obligations, wages, payments, or benefits constitute any future obligation of
21 the Purchaser. Any and all employees hired by the Purchaser in connection
22 with the operation of the Purchased Assets shall be and hereby are deemed
23 to be new hires of the Purchaser, and no such employee shall have any right
24 to claim from or against the Purchaser or any person or entity associated
25 therewith any obligations, wages, payments, in any way related to the
26 period prior to the Closing.

27
28 (ECF No. 56-1 at 36-37). The plain language of the Order Confirming Sale undoubtedly
29 defeats Caraballo's claim that her time in service with Marina Puerto del Rey continued
30 on to Marina. Marina's valuation of Marina Puerto del Rey's assets clearly considered
31 the wages, benefits, and obligations of Marina Puerto del Rey's employees and
32 *specifically* terminated those benefits. Had Marina believed that the time in service
33 remained for each of Marina Puerto del Rey's employees, it would have changed the
34 value Marina was willing to pay.

1 Further, unlike in *Rodríguez-Oquendo*, Caraballo was aware of the bankruptcy
2 proceedings and the terms of 363 sales are public. Had Caraballo felt wronged by the
3 explicit language of the terms of the sale, she could have objected as an interested party
4 to the terms of the sale that she believed infringed upon a vested right.² To find that the
5 employees of Marina Puerto del Rey retained their time in service despite the sale order's
6 express language to the contrary would undermine the very purpose of 363 sales and
7 would render several provisions of the bankruptcy order meaningless. We, therefore,
8 decline to adopt such an argument.

9 Caraballo's signed employment contract cures any remaining concerns as to
10 whether the time in grade of Marina Puerto del Rey's employees remained with them
11 after its sale to Marina. After a thorough interview process of all interested former
12 employees of Marina Puerto del Rey, Marina extended employment offers to selected
13 individuals, including Caraballo. Caraballo accepted the terms of the employment offer
14 and signed an employment contract acknowledging that she was a new employee of
15 Marina as of May 31, 2013. (ECF No. 46-2 at 1). The employment contract "constitutes
16 the only contract and understanding existing between [Marina] and [Caraballo] regarding
17 employment, confidentiality, noncompetition, and any other matter covered by this
18 agreement." (ECF No. 46-2 at 5).

19 We do not believe that our decision conflicts with Puerto Rico's Supreme Court
20 case law in *Rodríguez-Oquendo* because of the drastic differences between the facts of the

² To the extent that Caraballo believes her prior employer violated her rights by its agreement in the bankruptcy sale, she would effectively be raising a claim of successor liability. As she has expressly disavowed such a claim, this court need not review it.

1 two cases. The undisputed evidence before this court is that Caraballo bargained for
2 employment with Marina without any reference to her prior employment -- a position
3 entirely consistent with the language of the Order Confirming Sale. Having reached that
4 bargain, Caraballo may not now seek more than her contract provides. As a result, any
5 damages she may demonstrate are limited to the time she worked for Marina.³

Conclusion

7 For the aforementioned reasons, the court finds that the damages for any
8 successful claim for wrongful termination under Law 80 will be limited to the time
9 Caraballo was employed by Marina, in other words, from May 31, 2013, to August 19,
10 2013.

IT IS SO ORDERED.

12 San Juan, Puerto Rico, this 29th day of January, 2016.

S/José Antonio Fusté
JOSE ANTONIO FUSTE
U. S. DISTRICT JUDGE

³ The court has not addressed the claim that Caraballo was fired for good cause, but it would note that the plain language of 29 L.P.R.A. § 185f would preclude a liability finding in the case of a termination for good cause.